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In the Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN AIRLINES, INC., PETITIONER

v.

SCOTT DAVIES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Nothing in Respondent's Brief in Opposition ("Opp.") validly questions the important issue of federal preemption presented by the Petition. The Railway Labor Act ("RLA") relies upon an enforcement scheme that carefully balances labor arbitration and limited federal court jurisdiction to secure the Act's goals and to foster labor-management relations. There simply is no room for state tort jurisdiction. It is important for the Court to grant the Petition and rectify the destabilizing labor relations impact on air and rail carriers that results from the court of appeals' decision.[1]

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[1] The recurring character of this issue is evident in different ways. Only three days before the court of appeals issued its opinion below, another Oklahoma district court held that the RLA preempted a claim of wrongful discharge in violation of public policy in *Farley v. American Airlines*, C.A. No. 91-C-775-C (N.D. Okla. July 6, 1992). Recently, the Hawaii Supreme Court held that the RLA did *not*

I. DAVIES' CLAIM IS A MINOR DISPUTE BECAUSE HIS DISCHARGE WAS ARGUABLY JUSTIFIED UNDER THE LABOR CONTRACT.

Like the court of appeals below, Davies fails even to address *Conrail*'s test for "minor" dispute preemption under the RLA: if the carrier's disputed action is "arguably justified" by the collective bargaining agreement, the dispute is minor and exclusively committed to an Adjustment Board. *See* 491 U.S. at 307. Instead, Davies proposes that an employee may sidestep the RLA's exclusive procedures merely by claiming that the carrier's true reason for discharging him violates public policy, as long as the assertion of that claim does not itself depend on the labor contract. Davies cites not a single case on point, and the authorities he does cite are inapposite and cannot justify carving an exception to exclusive Adjustment Board jurisdiction whenever an employee elects to clothe his discharge grievance in public policy garb.

First, Davies relies on cases that, as a matter of *state* law, extend the cause of action for wrongful discharge in violation of public policy to employees covered by union contracts. Opp. at 6, 13, citing *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218 (Okla. 1992); *Southwest Forest Indus. v. Sutton*, 868 F.2d 352 (10th Cir. 1989) (applying Kansas law), *cert. denied*, 494 U.S. 1017 (1990). Davies thus confuses state-law determinations concerning the breadth of state wrongful discharge claims with federal-law decisions concerning the scope of minor dispute preemption. The former do not and cannot control the latter; rather, it is the extent of minor dispute preemption that sets the ultimate limit of the state-law claim. *Tate* and *Sutton* do not suggest otherwise; indeed, they do not even address

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preempt a virtually identical claim in *Norris v. Hawaiian Airlines*, 142 L.R.R.M. (BNA) 2201 (Haw. S. Ct. Dec. 16, 1992). American has been informed that a petition for certiorari in that case will be filed shortly.

preemption issues since neither plaintiff was employed under a union contract.[2]

Davies also invokes three decisions of this Court rejecting the exclusivity of arbitration with respect to claims arising under certain *federal* statutes. *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557 (1987) (FELA); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981) (FLSA); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII). Those cases stand for the unremarkable proposition that, while states cannot determine the boundaries of federal preemption, Congress obviously can. In all three cases, this Court recognized the need to accommodate the RLA to *federal* statutes designed to provide minimum substantive guarantees to individual workers, where Congress specifically intended those rights to be enforced in federal court. *Buell*, 480 U.S. at 564-66; *Barrentine*, 450 U.S. at 737, 739-40, 745; *Alexander*, 415 U.S. at 48, 51, 56. In this case, by contrast, there is no expression of congressional intent to permit states to exempt employees from the statutorily exclusive jurisdiction of the RLA Adjustment Boards.[3]

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[2] For the same reason, Davies' argument that certiorari should be denied based upon this Court's standards for reviewing state-law determinations (Opp. at 9) is misplaced. The Petition does not challenge Part II of the court of appeals' opinion below, which held as a matter of state law that Oklahoma would recognize a cause of action for wrongful discharge in violation of public policy brought by a union-represented employee. (App. 11a-14a). The Petition is limited to federal-law issues of RLA preemption.

[3] *Terminal R.R. Ass'n of St. Louis v. Brotherhood of R.R. Trainmen*, 318 U.S. 1 (1943), does not suggest a different result. In that case, the Court rejected a railroad's challenge to an Order of the Illinois Commerce Commission that required cabooses on trains to prevent injury to rear switchmen who previously had to ride on top or beside the train. The case did not present a dispute between the carrier and its employees; indeed, the Court assumed without deciding that, if it had, the dispute would have been subject to the jurisdiction of the Adjustment Board. Rather, the court held that the RLA did not so occupy the field of working conditions that it

Finally, Davies cites a state-court decision holding various tort claims not preempted by the Labor-Management Relations Act ("LMRA"), because the *claims* themselves were not based on the labor contract. *Commodore v. University Mechanical Contractors*, 839 P.2d 314 (Wash. 1992). This reasoning, which drives the court of appeals' opinion below, does not reflect the law even under the LMRA, much less the RLA, and should be rejected.

The court in *Commodore* expressly adopted its approach from a law student Note, describing it as "both workable and true to the language and holding of *Lingle*." 839 P.2d at 319. However, as the Note itself concedes, *Lingle*'s test was whether the "*resolution*" of a claim requires contract interpretation; under that formulation, a claim would be preempted if either the claim *or the employer's defense* involved interpretation of the contract. Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209, 209-11, 219 (1989). As American argued in its Petition (at 16-18), American's defense to Davies' wrongful discharge claim was based on his violation of rules and policies that made up part of the labor contract. That defense necessarily required the jury to interpret the labor contract in order to determine whether, as Davies alleged, American's stated reason for the discharge was a pretext. Federal labor policy, however, is equally violated when a jury interprets a collective bargaining agreement in the context of a plaintiff's claim or an employer's defense.

Davies repeatedly tries to minimize the significance of this case by suggesting that the public policy exception to preemption is a narrow one requiring "a clear mandate of public policy." Opp. at 4, 6, 11. That is not so. As American noted earlier, the breadth of such policies is virtually unlimited. Petition at 8-9. Moreover, nothing in *Commodore* or the decision below would limit an allegation

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precluded minimum state police-power regulations concerning safety and health. *Id.* at 6-7.

of pretextual discharge to a clear and narrow public policy. The policy could be anything not favored by state law; so long as it was not based on the collective bargaining agreement, the claim would not be preempted.

II. DAVIES' AUTHORITIES AFFIRM THAT WRONGFUL DISCHARGE CLAIMS BASED ON UNION ORGANIZING ACTIVITIES CAN BE BROUGHT ONLY UNDER SECTION 2 FOURTH OF THE RLA.

Assuming *arguendo* that Davies' claim were not preempted as a minor dispute, his efforts to avoid the preemptive effect of Section 2 Fourth of the RLA are unavailing. Davies asserts that his state-law claim effectuates RLA policy by providing Oklahoma employees a remedy for RLA violations, and consequently does not conflict with the RLA. Opp. at 4-5. State law, he argues, is not preempted absent an "actual conflict" with federal law. Opp. at 11, *citing Cipollone v. Liggett Group, Inc.*, 505 U.S. ——, 112 S. Ct. 2608 (1992) and *English v. General Elec. Co.*, 496 U.S. 72 (1990).

This argument misconceives preemption doctrine and miscites both *Cipollone* and *English*. As reaffirmed in each of those cases, preemption is a matter of congressional intent. That intent may be express in the statute, or it may be implied if the state law actually conflicts with federal law *or* if it "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English*, 496 U.S. at 79.[4] Such an intent may be inferred from a "scheme of federal regulation . . . so

[4] In addition to ignoring the preemption test discussed in both *Cipollone* and *English*, Davies misreads the contexts in which those cases addressed the issue of conflict with federal law. *Cipollone* was a case of express preemption. In such cases, implied preemption is inapposite, and preemption is determined solely in terms of the express language of Congress. 112 S. Ct. at 2618. In *English*, the Court's discussion concerning the absence of actual conflict occurred only after the Court had determined that there was no implied or "field" preemption. 496 U.S. at 86-87, 90.

pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or from a federal statute that addresses "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), quoted in *English*, 496 U.S. at 79.

It is evident from the structure and purpose of the RLA that Congress has pervasively occupied the field of carrier/employee disputes addressed in Section 2 of that Act. *See* Petition at 12-14. *See also O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1, 4 (1st Cir. 1992) ("RLA established a comprehensive conflict resolution procedure for railroad labor disputes"), *cert. denied*, —— U.S. ——, 1992 WL 353557 (Jan. 11, 1993). Similarly, there is a dominant federal interest in a uniform national labor policy and in the single federally prescribed system of dispute resolution.[5] The RLA leaves no room for state supplementation in these areas.

Davies' only response to such arguments is to assert that the RLA does not divest courts of jurisdiction to decide actions based on violations of RLA principles. Opp. at 7. He cites five cases for that alleged proposition. However, not one of them recognizes a state-law claim based on a violation of the RLA. Two of the cases did not involve alleged violations of the RLA at all.[6] The other three

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[5] In *English*, in concluding that there was no field preemption, this Court expressly distinguished the preemptive effect of the National Labor Relations Act, which (like the RLA) "comprehensively deals with labor-management relations from the inception of organizational activity through the negotiation of a collective-bargaining agreement." The Court further noted that special factors support the preemption of state labor relations law—specifically, Congress' perception that state legislatures and courts were not able to provide an informed and coherent labor policy. 496 U.S. at 86-87 n.8.

[6] *Pikop v. Burlington N. R.R.*, 390 N.W.2d 743 (Minn. 1986), *cert. denied*, 480 U.S. 951 (1987), held that the RLA did not pre-

cases merely reaffirm the existence of an implied *federal* cause of action to enforce Section 2 Fourth under the RLA.[7] None of them suggests or supports the extraordinary conclusion that an RLA-covered employee can bring a state common-law action to enforce the RLA. Davies' attempted reliance on a state-law claim allegedly intended to promote the policy goals of the RLA is particularly misguided in view of his voluntary abandonment of his federal claim based directly on the RLA itself. *See* Petition at 4.

III. ARBITRATION BOARDS ARE FULLY COMPETENT TO RULE ON CLAIMS OF PRETEXTUAL DISCHARGE, AND IN ANY EVENT THE REMEDY FOR ANY DEFECT IS PROVIDED BY FEDERAL LAW, NOT STATE LAW.

Davies argues that arbitration was an inadequate forum in which to litigate his claim, for three reasons: (1) American's motive was not and could not have been examined; (2) arbitrators lack expertise to adjudicate questions of law; and (3) Davies was represented by the TWU, the same union he sought to replace. Opp. at 14-15. None of these reasons defeats preemption of his claim.

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empt claims of intentional infliction of emotional distress based upon sexual and racial harassment. The court specifically noted that if the plaintiffs had been suing for wrongful discharge, their claims would have been preempted as minor disputes. *Id.* at 750. *Price v. PSA, Inc.*, 829 F.2d 871 (9th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988), did involve an allegation of retaliation for union organizing, but in violation of the California Labor Code. In remanding the case to the state court, the Ninth Circuit explicitly stated that it expressed no opinion on the merits of the preemption defense itself, declaring its confidence in the ability and willingness of state courts to enforce federal defenses. *Id.* at 876.

[7] *Arcamuzi v. Continental Air Lines*, 819 F.2d 935, 936 (9th Cir. 1987); *Roscello v. Southwest Airlines*, 726 F.2d 217, 220 (5th Cir. 1984); *Burke v. Compania Mexicana de Aviacion*, 433 F.2d 1031, 1033 (9th Cir. 1970).

First, the suggestion that arbitrators cannot evaluate the motivation for a discharge is nonsense. Arbitrators, like judges, routinely evaluate issues of motivation and credibility. For the same reason, arbitrators are fully capable of addressing claims of pretextual discharge, which is the only relevant legal issue presented in connection with a claim of wrongful discharge in violation of public policy.[8]

In Davies' case, the Arbitration Board did not consider whether American's "true" reason for discharging Davies was retaliation for his union-organizing activities. That issue was not argued to the Board. (App. 34a-35a). It is not apparent from the record whether Davies chose not to raise the issue or whether he wanted to assert it but was overridden by his union representative, the TWU. If the former, Davies cannot be heard to complain. If the latter, it is *federal* law, in the form of a duty of fair representation claim arising under the RLA, that provides the remedy. *See Glover v. St. L.-S.F. Ry.*, 393 U.S. 324 (1969).

Finally, assuming *arguendo* that arbitration was somehow inappropriate and thus not exclusive, Davies' alternative was a federal cause of action under Section 2 Fourth of the RLA. Davies was fully aware of the availability of this remedy—indeed, he amended his original Complaint to assert that cause of action and amended his jurisdictional basis to include federal question jurisdiction. In his second Amended Complaint, while fully aware that American was challenging his state-law action as preempted by the RLA, Davies elected to abandon the federal cause of action under

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[8] An arbitrator would never need to confront the only other legal question that arises in connection with such claims: whether the "policy" at issue is one that the state would recognize as the basis for a wrongful discharge claim. That issue would be moot in arbitration because a discharge not justified under a collective bargaining agreement would be overturned for lack of "just cause" whether or not the employer's motive violated "public policy."

Section 2 Fourth. He thereby assumed the risk that the court might hold his state-law claim preempted and dismiss his Complaint. Davies cannot now claim prejudice if this Court reverses the judgment below and orders that result.

CONCLUSION

For all of the foregoing reasons, and the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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